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In the Supreme Court of Pennsylvania.

JAMES NELSON, PLAINTIFF IN ERROR vs. S. F. VON BONNHORST ET AL.,
FOR USE, DEFENDANTS IN ERROR.

A sealed instrument in these words: "Due A. \$1,071, for value received, which I hereby promise to pay *whenever*, IN MY OPINION, *my circumstances will be such as to enable me so to do*," does not create any legal obligation, which can be enforced by action; nor will it support a *narr* alleging a promise by the obligor to pay "whenever his circumstances were such, &c.," with an averment of ability to pay.

(Error to the District Court of Alleghany County.)

This was an action of debt brought by S. F. Von Bonnhorst & Co. for the use of Alvin Wilkins, against James Nelson, upon a specialty, in the words following, to wit:

"PITTSBURG, JANUARY 10, 1852.

Due S. F. Von Bonnhorst & Co., ten hundred and seventy-one dollars forty-six cents, for value received, which I hereby agree to pay whenever, in my opinion, my circumstances will be such as to enable me so to do, any receipt to the contrary notwithstanding. Witness my hand and seal the date first above written.

JAMES NELSON. [L. s.]"

The *narr* assigns an undertaking and promise on the part of defendant to pay "whenever his circumstances were such as to enable him so to do," and avers that "his circumstances were such as to enable him to pay." Defendant pleaded "*non assumpsit*, payment with leave, &c.," and on the trial added "want of consideration and release."

The plaintiff on the trial put the due bill in evidence and rested. The defendant on his side called S. F. Von Bonnhorst, one of the legal plaintiffs, and the counsel of the beneficial plaintiff objecting, the court sustained the objection and sealed a bill of exceptions at request of the defendant.

Defendant then called a witness to prove that the paper upon which suit was brought is in the handwriting of S. F. Von Bonnhorst, and that a paper of same date signed by "*E. F. Shænberger*

by *S. F. Von Bonnhorst & Co.*," and by "*Stephens, Shæmberger & Co. by S. F. Von Bonnhorst & Co.*," is also in his handwriting. The paper was then offered in evidence, objected to, objection overruled and paper read to the jury; it bore even date with the due bill, and was a release of an indebtedness from Nelson to Stephens & Schœnberger.

The defendant then closed, and the court directed the jury to find for the plaintiffs, subject to its opinion whether upon the whole evidence in the case the plaintiffs are entitled to recover.

After argument on the questions reserved, the court (HAMPTON, Pres't.,) delivered the following opinion:

"This was an action of debt on a sealed instrument, of which the following is a copy, viz:

'Due S. F. Von Bonnhorst & Co., Pittsburg, January 10th, 1852, ten hundred and seventy-one dollars forty-six cents, for value received, which I hereby agree to pay whenever in my opinion my circumstances will enable me to do so, any receipt to the contrary notwithstanding. Witness my hand and seal the date above written.

(Signed,)

JAMES NELSON. [L. s.]'

"The plaintiffs gave this due bill in evidence, and closed their case.

"The defendant's counsel then offered in evidence a paper bearing the same date with the due bill, which was read, subject to the opinion of the court on its competency as well as its legal effect, and here the defendant closed.

"The due bill given in evidence by the plaintiffs, and the paper read by the defendant, constituting all the evidence in the case, and there being consequently no question of fact for the jury to pass upon, the court directed the jury *pro forma* to return a verdict in favor of the plaintiffs, subject to the opinion of the court on the law arising upon the evidence.

"Two questions of law are raised by this evidence. First, whether the instrument sued on creates any legal liability on the part of the defendant, which can be enforced in an action of law?

“And, second, whether the paper given in evidence by the defendant constitutes a valid defence? The determination of either of those questions in favor of the defendant, will prevent a recovery in this action.

“The difficulty the defendant has to encounter on the second question, is, that the release or receipt on which he relies is not between the same parties as those to the due bill in suit, and there is no evidence tending to connect them. The release purports to be the act of the plaintiffs in the judgments—while the due bill is not to them, but to S. F. Von Bonnhorst & Co., and there is not the slightest evidence that the consideration of the due bill was the indebtedness of Stackhouse & Nelson to E. F. Shoenberger and Stephens, Shoenberger & Co., so that neither the court nor jury would be justified in finding that the two papers relate to one and the same transaction. This paper, then, must be rejected entirely.

“The only question, then, is, as to the sufficiency of the due bill to support the action.

“This paper is certainly very peculiar in its terms, and at first sight seems to favor the view taken by the defendant’s counsel, that it creates no legal liability on the part of the maker, but merely evidences a debt of honor. If this were the true construction, the paper itself was wholly unnecessary, as a debt of honor requires no such evidence to support it. A different construction, therefore, is rendered necessary by the intention of the parties, as clearly manifested by the existence of the writing itself. If we look to the contents of the instrument for its true meaning, it shows clearly the acknowledgment, under seal, of a pre-existing debt for value received, which was due at the date of the paper. This acknowledgment was absolute, unqualified and unconditional, for a sum certain, payable in money. The obligation, therefore, rests upon no condition or contingency whatever. The clause which creates the difficulty, then, can only have reference to the *time of payment*. The language of the obligor is not, that he will pay “*if*” in his opinion his circumstances will enable him to do so; but it is “*whenever*” such shall be the case: showing plainly that it refers merely to the time of payment. What then was the intention of the parties at the

time this obligation was given? The debt was admitted to be then due, so that any extension of the time of payment was a mere matter of grace, and did not enter into, nor form any part of the consideration of the indebtedness. The intention of the parties clearly was, that although the debt was due, yet time should be given—that the debtor should not be pressed for payment. At most it could only be construed into a promise not to sue—but as the debt was pre-existing, and no consideration to support such a promise is shown, it was a mere *nudum pactum*, and constitutes no estoppel either at law or in equity. And besides, if time was to be given, the debtor has had five years, which would seem to be sufficient, especially as no allegation of inability to pay has been made by him.

“By expunging the phrase in question as inconsistent with, and repugnant to, the body of the note, we have a perfect instrument, creating a clear legal liability. It would then read thus: ‘Due S. F. Von Bonnhorst & Co., Pittsburgh, January 10, 1852, ten hundred and seventy-one $\frac{46}{100}$ dollars, for value received. Witness my hand and seal the date above written.’ By thus rejecting the clause under consideration, we carry out the intention of the parties and conform to a well-settled rule of law, that the instrument is to be taken most strongly against the contractor, regard being first had to the apparent intent of the parties. Chitty on Contracts, 21–2. And in furtherance of this maxim, the courts, in order to give effect to an instrument, will reject words, in themselves clear and explicit, which would, if allowed to operate, destroy the instrument. Thus, when a man, for a good consideration, gave a note expressed to be “for money borrowed, which I promise *never* to pay,” it was held that the word “*never*” should be expunged. 2 Atkins, 32. Chitty on Con. 21. Chitty on Bills, 6 ed. 92. And on the same principle, a bill or note, made payable to the order of a fictitious person, shall be construed and considered as payable to bearer. 1 H. Bl. 569. By applying these principles to the case at bar, we are of opinion the plaintiffs are entitled to recover.

“Let judgment be entered for the plaintiffs on the verdict, on the question reserved.”

To this opinion the defendant’s counsel excepted.

The plaintiff in error assigned for error in this court, the rejection of S. F. Von Bonnhorst as a witness, and the entering judgment in favor of the plaintiffs below, on the reserved question.

Mr. G. P. Hamilton, for plaintiff in error, on the first error, cited *Himblewright vs. Armstrong*, 1 Casey, 428; *Morton vs. Morton*, 13 S. & R. 108; *Krook vs. Krook*, 4 W. & S. 127; *Work vs. Maclay*, 2 S. & R. 415; *Salmon vs. Rouce*, 3 S. & R. 311; *Browing vs. Shippen*, 2 Bin. 154; *Ralph vs. Brown*, 3 W. & S. 400; *Taylor v. Fitzsimmons*, 17 S. & R. 453; *Harding vs. Mott*, 8 Harris, 469; *Hatz vs. Snyder*, 2 Casey, 511; *Modderwell vs. Clever*, 8 W. & S. 63. On the second error he argued that the latter clause of the instrument qualifies and limits defendant's liability. *Bernard vs. Cushing*, 4 Metc. 230; *Matthews vs. Ollerton*, Coneb, 218; *M. N. Co. vs. Fenlon*, 4 W. & S. 212. The case must be decided on the evidence, and not on the pleadings and evidence; the pleas do not admit that the contingency has arisen, upon which defendant's liability depends, and there was no evidence offered by plaintiffs below on that subject.

Mr. A. W. Foster, for defendants in error, argued that a nominal party cannot be examined as a witness, unless by consent of the party in interest. 1 Greenl. Ev. Sec. 353; 8 Taunton, 139; 4 Eng. C. L. Rep. 49; 20 Johns. Rep. 142; 1 Wendell, 20; 13 Pickering, 125. Nelson's promise was based upon the moral obligation to pay, which existed notwithstanding the release, and was a sufficient consideration, 2 Bin. 591; 12 S. & R. 171. If this paper was intended as merely evidence of a moral or honorary obligation, why put it in writing, and invest it with the solemnity of a seal. It is plainly an acknowledgment of indebtedness, and fixes the time of payment, when in the opinion of the obligor, he shall be able: his ability to pay is charged in the narr, and is not denied by the pleas; being able, as he thus admits, he must have known the fact, and it follows as a necessary consequence, that it must have been his opinion "that his circumstances were such as to enable him so to do."

The plea of want of consideration cannot avail one who executes

and delivers a specialty voluntarily; as the plaintiff in error alleges was done here. 3 Casey, 121.

The opinion of the court was delivered by

LOWRIE, J.—One of the simplest functions of government is that of enforcing the contract relations of its citizens; one of its most difficult, is that of rightly establishing between citizens, or recognizing as established by custom, those other relations and duties that grow out of the nature of human society, and out of the moral principles which it recognizes as essential to good order. Government takes no active part in the institution of contract relations, but only in the protection and enforcement of them, leaving the citizen entirely free to enter into such relations or not, as he pleases; provided only that they be not inconsistent with existing civil institutions, or with the social ideas of morality. In other matters, government not only institutes, but enforces relations, and it is in the exercise of this function that the greatest caution and wisdom are required, and that the greatest wrongs to individual liberty are apt to be inflicted.

In the present case, we have no other duty to perform than the enforcement, and as involved therein, the interpretation of a contract relation. The suit is on a contract, and we must ascertain what the contract is, and enforce it according to our interpretation of what the parties must have intended by it. If we go further, we institute a relation not intended by the parties, and enforce what we suppose to be a mere duty, when the plaintiffs are in form only demanding the enforcement of a contract, and show no right to any duty but that which it expresses.

The contract is in writing, and the defendant acknowledges himself in debt to the plaintiffs, and promises to pay them thus, "when-ever in my opinion, my circumstances will enable me to do so." As an expression of intention can anything be plainer than this. The express contract of the parties is that the debtor is to pay when he shall be able, and that he shall be the judge of his ability. No doubt the parties thought this a reasonable arrangement when they made it, though the creditors think otherwise now. If it is

reasonable for a man to release a debt altogether, surely it is reasonable to release the securities for a debt, not itself released, as is done in covenants not to sue. And even if it be not reasonable, we cannot set up our reasons or the public reason for that of the contracting parties, and make a contract for them that is contrary to their plain intention, without violating the first principles of freedom and the very nature of contract relations.

We cannot read this contract at all as a legal obligation; for the debtor reserves to himself the control of the remedies upon it. The agreement to pay is here; but the right to enforce is, by mutual consent, expressly withheld, and thus the obligation is merely a moral one.

To say that the law will, in such a case, adjudge the debtor to have decided that he is able to pay, whenever the court and jury find that he is so, is only a mode of getting clear of the real contract by assuming a fictitious and constructive one. It would still be the imposition of a duty as a contract, contrary to the expressed intention of the parties. The instrument given in evidence does not and cannot prove the issue on which the parties went to trial. This view of the contract renders the other questions raised in the trial immaterial.

Judgment reversed, and judgment for defendant below on the reserved question, *non obstante veredicto*.

In the Supreme Court of Wisconsin.

SAMUEL LUMSDEN AND WILLIAM LUMSDEN, APPELLANTS vs. THE CITY OF MILWAUKEE, APPELLEE.

By the 11th art. of the Constitution of Wisconsin, it is provided that "no municipal corporation shall take private property for public uses, against the consent of the owner, without the necessity thereof being first established by the verdict of a jury." The charter of the city of Milwaukee authorized the judge of the Circuit or County Court of Milwaukee, where land is proposed to be taken for public use, to